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No. 85-2006 and No. 85-1963

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL CAN CORPORATION, *et al.*,
Appellants,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

TYLER PIPE INDUSTRIES, INC.,
Appellant,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Washington

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

JEAN A. WALKER *
Tax Counsel
Committee on State Taxation
of the Council of
State Chambers of Commerce
122 C Street, N.W.
Suite 200
Washington, D.C. 20001
(202) 484-8103

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a state's gross receipts tax system which imposes a tax on manufacturing and on selling activities but exempts from taxation the manufacturing activities of purely local manufacturer-sellers impermissibly discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution?

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INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the Appellants in the

above-captioned cases. Written consents of the Appellants and the Appellee have been obtained and are attached herewith.

INTEREST OF AMICUS CURIAE

The Council of State Chambers of Commerce (COUNCIL), organized in 1932, consists of 41 Chambers of Commerce. The Committee on State Taxation (COST), one of the three advisory committees of the COUNCIL, consists of 249 corporate members which conduct a substantial portion of the interstate commerce of United States taxpayers. One of COST's principal activities has been to work with the states and others toward developing fair and equitable standards of state taxation.

Member companies of COST are representative of that part of the Nation's business sector which is most directly affected by state taxation of interstate operations. COST is, therefore, vitally interested in cases such as this one which present issues significantly affecting state and local taxation of interstate commerce.

Member companies of COST conduct business in Washington, West Virginia and Indiana, and in many local taxing jurisdictions, such as Los Angeles and Philadelphia—all of which have gross receipts tax systems. This Court in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), made clear that, in determining the validity of a state's gross receipts tax under the Commerce Clause, the principle of "internal consistency" applies. Under this rule, a state tax must have an internal consistency such that, if the challenged tax were applied by every jurisdiction, there would be no impermissible interference with interstate commerce.

Washington's gross receipts tax at issue in this case is the mirror image of the West Virginia taxing system declared unconstitutional in the *Armco* case. Like West Virginia, Washington imposes a gross receipts tax on the

privilege of manufacturing within the state. Wash. Rev. Code § 82.04.240. Similarly, Washington also imposes a gross receipts tax on companies engaged in the business of selling at wholesale and at retail. Wash. Rev. Code §§ 82.04.270 & 82.04.250. The Washington "multiple activities" exemption is the reverse of that found in the West Virginia tax scheme, exempting wholly intrastate businesses from the manufacturing tax instead of the selling tax. Washington manufacturer-sellers, who are taxed as wholesalers or retailers, are exempt from taxation as manufacturers. Wash. Rev. Code § 82.04.440.

The discriminatory effect in this case is identical to that found by the Court in *Armco.* Both gross receipts tax systems lack internal consistency. If the precise tax scheme of each state were projected into other states, as was shown in *Armco*, interstate manufacturer-wholesalers would be subjected to two gross receipts taxes while wholly intrastate manufacturer-wholesalers are assured of being subjected to only one such tax. The West Virginia tax system invalidated in *Armco* and the Washington taxing scheme here at issue both discriminate against interstate commerce in favor of wholly local, intrastate commerce. If the Washington Supreme Court had applied the "internal consistency" test prescribed by the Court in *Armco*, it would have been equally clear that the Washington gross receipts tax scheme is also unconstitutionally discriminatory under the Commerce Clause. The Washington Supreme Court, however, held that the Washington tax does not discriminate against interstate commerce, choosing to disregard the Court's decision in *Armco* as controlling precedent and relying instead on earlier cases in which the state's gross receipts tax withstood various commerce clause challenges because it was "unable to find . . . a command in the *Armco* decision" to "disregard earlier decisions not overruled." 105 Wash. 2d at 332.

Appellant interstate businesses in the "test case" before this Court, *National Can Corporation, et al. v. State of Washington, Department of Revenue*, No. 85-2006, are representative of more than 100 taxpayers engaging in interstate commerce who filed substantially similar actions in reliance upon the Court's decision in *Armco*. The critical issue in all these cases is whether Washington's application of its Business and Occupation Tax, a gross receipts tax functionally indistinguishable from the West Virginia tax invalidated in *Armco* because it subjected interstate commerce to an unfair burden of multiple taxation not borne by local commerce, impermissibly discriminates against interstate commerce.

The decision of the Washington Supreme Court, in its disregard of the "internal consistency" test for establishing constitutionally impermissible multiple taxation burdens upon interstate commerce, is in irreconcilable conflict with this Court's decision in *Armco* and is inconsistent with prior rulings by this Court striking down discriminatory state taxes under the Commerce Clause. This case is indistinguishable from *Armco* and the conflicting decision below threatens to disrupt the current progress by the states toward assuring a reasonably consistent and fair system of taxation throughout the nation which will (1) allow each state to receive its just share of the total tax contribution of the nation's business sector, (2) prevent inequity and (3) protect the Constitutional rights of interstate corporate taxpayers.

SUMMARY OF ARGUMENT

A state's gross receipts tax scheme which subjects an interstate manufacturer-seller to multiple taxation not borne by a local wholly intrastate competitor constitutes an impermissible discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

ARGUMENT

THE WASHINGTON B&O TAX OPERATES DISCRIMINATORILY TO IMPOSE A BURDEN ON INTERSTATE COMMERCE NOT BORNE BY INTRASTATE COMMERCE

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court held that West Virginia's wholesale gross receipts tax, from which local manufacturers were exempt, unconstitutionally discriminated against interstate commerce notwithstanding that local manufacturers making sales in the state were subject to a much higher manufacturing gross receipts tax. The West Virginia tax was found to be facially discriminatory because two companies selling tangible property at wholesale in West Virginia would be treated differently depending on whether the taxpayer conducted manufacturing in the state or out of it. The discriminatory effect on interstate commerce in favor of wholly local intrastate commerce was further demonstrated when the state's precise tax system was projected into other states:

> "If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." 467 U.S. at 644.

This Court in *Armco* specifically rejected the view that actual discrimination against interstate commerce must be shown and adopted the principle of "internal consistency" in determining the validity of a state's gross receipts tax under the Commerce Clause:

> "Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. This is

> not the test. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, —— (1983), the Court noted that a tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade. In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce." 467 U.S. at 644.

Any other rule, the Court noted, would mean that the constitutionality of the tax would depend on the "shifting complexities" or the "vagaries" of the tax laws of the other states having nexus to tax the activities in question. *Id.* at ——. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444 (1980); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946).

As the stipulated facts in the record of the *National Can* case show, the gross receipts tax imposed by the State of Washington fails to meet the "internal consistency" test of *Armco.* If the Washington tax system were in effect in other jurisdictions, companies engaging in interstate commerce who manufacture in Washington but sell their products outside the state would be subject to both a manufacturing tax and a selling tax. The converse is also true. Out-of-state companies manufacturing goods in a state having the same taxation provisions as Washington would be subject to two taxes on interstate sales to Washington customers. The state of manufacture would exact a manufacturing tax measured by gross sales receipts and Washington would levy a tax on wholesale or retail sales to Washington residents.

This same burden of multiple taxation is not borne by wholly intrastate local competitors, both manufacturing and selling in Washington, since the Washington Business and Occupation Tax Law contains anti-double

taxation provisions by granting Washington manufacturer-sellers an exemption from the manufacturing tax. The Washington gross receipts tax scheme provides wholly local intrastate businesses a tax benefit, unavailable to taxpayer companies engaged in interstate commerce, of "two activities for the price of one" (105 Wash.2d at ——), as the court below acknowledged.

The discriminatory effect of the Washington gross receipts tax system in this case, identical to the burden on interstate commerce found unconstitutional under the "internal consistency" test of *Armco*, was acknowledged by the court below:

> "Any direct commercial advantage to local businesses inherent in Washington's B&O tax results from duplicative tax burdens; *e.g.*, the fact that strictly local businesses pay only one tax (either wholesale or manufacturing), while interstate businesses may possibly be subjected to one tax in this state and another tax at a different level of distribution in another state." 105 Wash.2d at ——.

The Washington Supreme Court, in premising its decision upholding the validity of the Washington tax under the Commerce Clause on *misstated factual differences*,[1] attempts to put aside the Court's decision in *Armco* and obscures the fact that the gross receipts tax system imposed by the State of Washington operates in precisely the same manner as the invalidated West Virginia tax with the same result of impermissible discrimination against interstate commerce.

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[1] The court below emphasized that an essential distinction existed between the Washington and West Virginia gross receipts tax schemes because, unlike Washington which imposes identical rates on each activity, West Virginia imposed a higher tax on wholesaling (0.88%) than on manufacturing activities (0.27%). This distinction was perceived to override the obvious similarities between the two states' taxes and was the basis for the finding that the Washington selling and manufacturing taxes were compensatory. In fact, West Virginia tax exacted the higher tax on its in-state manufacturers (0.88%).

This Court has repeatedly struck down state tax schemes which had the comparable effect of benefitting local interests, emphasizing that a fundamental principle of Commerce Clause jurisprudence mandates that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *See Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984); *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984); *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *see also Metropolitan Life Insurance Co. v. Ward,* —— U.S. ——, 105 S. Ct. 1676 (1985) (Alabama's domestic preference tax law which taxed out-of-state insurance companies at a higher rate than domestic insurance companies declared unconstitutional under the Equal Protection Clause where the effect of the discrimination found similar to the type of burden on interstate commerce prohibited by the Commerce Clause). For that reason, Washington's attempt to circumvent the *Armco* holding should be struck down in the cases before this Court.

CONCLUSION

For the foregoing reasons, Washington's gross receipts tax system should be declared in violation of the Commerce Clause of the United States and the decisions below should be reversed.

Respectfully submitted,

JEAN A. WALKER *
Tax Counsel
Committee on State Taxation
of the Council of
State Chambers of Commerce
122 C Street, N.W.
Suite 200
Washington, D.C. 20001
(202) 484-8103

* Counsel of Record